87-512

No. _____

****

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID BERRY'AN, an individual

PETITIONER,

VS.

HUGHES AIRCRAFT COMPANY, a corporation, Thomas W. Tong, an individual, A.H. Ruysser, an individual, Edward Kulyeshie, an individual, D.M. Sugden, an individual, Gerald Hermann, an individual, and Does 1 through 10, inclusive,

RESPONDENTS.

****

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

****

Of Counsel
LATHAM & WATKIN
Deanne P. George
Keith M. Parker
701 "B" St. #2100
San Diego, Calif.
92101-8197
(714) 752-9100

DAVID BERRY'AN
606 Levering Ave. #216
Los Angeles, Calif. 90024
(213) 824-1982
PETITIONER
In Propria Personae

September 26, 1987

QUESTIONS PRESENTED FOR REVIEW

This is an action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, providing for injunctive and other relief against discrimination in employment, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, providing for the equal rights of persons in every state and territory within the jurisdiction of the United States to make and enter into contracts, alleging employment discrimination because of race or color, and under the Equal Pay Act, equal pay for equal work of the Fair Labor Standards Act of 1938, §§ 1 et seq; 6(D) as amended 29 U.S.C.A. §§ 201 et seq; 206(d); Civil Rights Act of 1964, § 703(a) (1) as amended 42 U.S.C.A. § 2000e-2(a) (1).

Thus, this case presents the following important questions which cry out for plenary consideration by this honorable court:

1. Whether Plaintiff suffered disparate treatment, disparate impact and discriminated

against by terminating him on June 17, 1983.

2. Whether Plaintiff was discriminated against by not selecting him for another position in which he applied for and were qualified for within the company prior to his termination.

3. Whether Plaintiff was paid less than white employees for substantially equal work in terms of the skill, efforts and responsibilities performed.

4. Whether Plaintiff suffered a continuing and extensive course of harassment of which defendants were aware and failed to take reasonable steps to remedy, acting willfully and maliciously, with a conscious and deliberate disregard of these actions.

TABLE OF CONTENTS

APPENDIX

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

STATUTES AND RULES

RULES OF THE SUPREME COURT

****

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID BERRY'AN, an individual

PETITIONER,

VS.

HUGHES AIRCRAFT COMPANY, a corporation, Thomas W. Tong, an individual, A.H. Ruysser, an individual, Edward Kulyeshie, an individual, D.M. Sugden, an individual, Gerald Hermann, an individual, and Does 1 through 10, inclusive

RESPONDENTS.

****

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

****

The Petitioner, David Berry'an, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 19, 1987.

OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming the district court's judgment on 19 March 1987. A copy of the memorandum is attached as Appendix A.

The Court denied petitioner's petition for rehearing on 24 April 1987. A copy of the order is attached as Appendix B.

For further clarity the judgment and order of the District Court for the Central District of California in Los Angeles is set forth in Appendix C.

JURISDICTION

The Ninth Circuit's judgment became final on 19 March 1987. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C.A. § 1254 (1) and Rule 19, Rules of the Supreme Court as amended in 1980.

STATUTES INVOLVED

The principles of law involved herein are found under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2000e-17

17, providing for injunctive and other relief against discrimination in employment, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, providing for the equal rights of persons in every state and territory within the jurisdiction of the United States to make and enter into contracts, alleging employment discrimination because of race or color, and under the Equal Pay Act, equal pay for equal work of the Fair Labor Standards Act of 1938, §§ 1 et seq.; 6(D) as amended 29 U.S.C.A. §§ 201 et seq.; 206(d); Civil Rights Act of 1964, § 703(a) (1) as amended 42 U.S.C.A. § 2000e-2(a) (1).

STATEMENT OF THE CASE

The District Court for the Central District of California in Los Angeles had subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. This court has jurisdiction pursuant to 28 U.S.C.A. § 1254 (1) and rule 19, Rules of the Supreme Court as amended in 1980. The judgment entered by the District Court is a final decision which disposed of all claims and which is properly appealable to this Court.

Petitioner's appeal was timely filed, The District Court entered final judgment herein on December 4, 1985, and petitioner filed his Notice of Appeal on January 3, 1986. Petitioner's brief was due on May 12, 1986 and was filed and served on May 21, 1986. On that day, the petitioner submitted a motion for a nine day extension to file his brief, the petitioner's opening brief was filed on 8 September 1986. See Appendix D. The Court of Appeals entered its memorandum decision

affirming the District Court's judgment on 19 March 1987. See Appendix A. the Court denied petitioner's petition for rehearing on 24 April 1987. See Appendix B. The petitioner submitted a motion for stay of mandate on 30 April 1987, the petitioner Stay of Mandate was filed and granted on 30 June 1987. See Appendix E.

Petitioner was hired by Defendant (HUGHES AIRCRAFT COMPANY) on 2 June 1975 as a salaried employee; petitioner was hired to work in the Support Systems Group, and remained there until the project was concluded in or about September 1976. The petitioner's title per responsibilities was as Automatic Test Engineer (Design Programmer) performing the duties and having the responsibilities of a Member of the Technical Staff (MTS) and classified as a Student Engineer; petitioner's Performance Appraisal Exhibit # 261 indicates that his assigned duties are greater than the classification requirement. The duties would

normally be assigned to an MTS. The petitioner's salary rate was lower than his co-workers but performed equal work as other [MTS] employee's performed, as was indicated in petitioner's Performance Appraisal dated 2/26/76, Exhibit # 261.

When the above project was concluded in the fall of 1976, petitioner transferred to the Electro-Optical and Data Systems Group, located in El Segundo, California. Petitioner joined an engineering department responsible for the automatic test equipment used to test the MK-5 Trident Guidance and Control System. Petitioner's title per responsibilities was application programming engineer [Design and Checkout of Software and Hardware and classified as a student engineer, petitioner's salary rate was much lower than other MTS but performed equal work].

On October 20, 1977, petitioner's manager started to harass him by falsely accusing petitioner of attendance. Mr. Earl Peay and

Mr. Ronald Tong started to falsely to accuse petitioner and warned him in writing (Exhibit # 14). This information was placed in petitioner's personal file. Petitioner informed Mr. Peay and Mr. Tong that this information was false. Petitioner informed the defendants that he was being accused of being late on "SATURDAY" when in-fact petitioner did not work or required to work on Saturday. Petitioner showed the defendants his paycheck stub for the week worked and indicated to each of them that he did not work on Saturday (Exhibit # 239). Defendants did nothing to correct their action, after being shown that they were wrong.

In November 1978, petitioner obtained another position within the Radar Systems Group, in the Engineering Laboratory, responsible for the Radar system for the F-18 Fighter Plane. Petitioner's title per responsibilities was as System Test and evaluation Engineer (F-18 Radar) performing the duties

and having the responsibilities of an MTS and classed as a student engineer. Petitioner's salary rate was much lower than other MTS' but performed equal work as was indicated in petitioner's Performance appraisal dated 3/5/80 (Exhibit # 18).

During the remainder of petitioner's employment with defendants, petitioner worked with the Space and Communication Group, working on the KU-Band Project. This project involved the design, development and testing of a special radar and communications system ultimately used in the NASA Space shuttles. Petitioner's title per responsibilities was as System Engineer (Space Shuttle Rendezvous Radar) performing the duties and classified as a student engineer. Petitioner's Performance Appraisal dated 3/17/81 indicates that petitioner was working at an MTS level with an excellent attitude and sense of responsibility about his work (Exhibit # 266). Petitioner's salary rate was much lower than

other MTS' but performed equal work.

Petitioner continued to work at an MTS level as was indicated by his Performance Appraisal dated 3/10/82 (Exhibit # 50). Petitioner's salary rate was much lower than other MTS' but performed equal work. Defendants rated the petitioner as Superior in Knowledge, Productivity, Creativity, Quality and Judgment (Exhibit # 50). In or about March 21, 1982 petitioner was denied his annual salary increase (Exhibit # 49). In or about March 21, 1983 petitioner was again denied his salary increase (Exhibit #280). Petitioner was given no valid reason for each of such denials; each of the years prior to 1982 and 1983 petitioner had received a salary increase.

Several months prior to petitioner's denial of his March 21, 1982 salary increase there was a managerial and organizational change. After the initial reorganizational change, management was constantly being

changed; first there was Mr. Fred A. Schneider, then Mr. D.H. Sugden and Mr. A.H. Ruysser, then there was Mr. T.W. Tong and Mr. Ed Kulyeshie and Mr. G. Hermann.

During the period commencing after the reorganizational change until the date of petitioner being terminated on June 17, 1983, petitioner was the target of general harassment and discriminatory practices by defendants and each of them. Petitioner received in inter-office-mail a Racist Newspaper Article addressed to him directly (Exhibit # 208). Petitioner did inform the employee relations officer of this racist newspaper article. Defendant Mr. T.W. Tong started to falsely accuse petitioner of poor work habits and being late to work. Petitioner informed Mr. Tong in writing that this was not true (Exhibit # 62). Mr. Tong took no steps to correct his actions and placed this false information in petitioner's personnel file (Exhibit # 62).

On March 15, 1983, petitioner was suspended from work without pay until March 17, 1983 (Exhibit # 68). At the time of suspension the petitioner informed and showed Mr. Tong that this suspension was wrongful. The petitioner showed the defendants that he had been randomly clocking in and out to verify that he was there on time. At the time of the suspension petitioner informed the defendant that Mr. Tong was falsely accusing him of being late to work. Petitioner showed the defendants that on March 9, 1983 Mr. Tong was on "Vacation" himself (Exhibit # 211), a date in which Mr. Tong said petitioner was late to work. Petitioner also showed defendants that Mr. Tong and several other people were changing his time card (Exhibit # 319), to justify petitioner's suspension.

Defendants suspended petitioner willfully, wantingfully, maliciously and with the intention to discriminate against petitioner because of his race. when petitioner

returned to work, he filed a grievance with employee relations (Exhibit # 71). Defendants stated that they would not remove false documents from personnel file (Exhibit # 71).

Prior to petitioner's termination, petitioner made numerous attempts to find an in-house transfer to another unit within the defendants' company (exhibit # 289). The petitioner applied for numerous positions described as open and available within the company. Petitioner was denied each of these positions and was told that he was to hardware oriented (Exhibit # 303), and in another instance because he needed more hardware experience (Exhibit # 294), and in another instance because he was not adaptable to the Space and Communications Group (Exhibit # 287), and in another instance because he had a bad personnel file (Exhibit # 299). Petitioner even applied for a trainee-position and he was denied. After the petitioner's rejection, the position remained open and

employment continued to seek applications from persons of petitioner's qualifications (Exhibit # 227) a trainee position was still available as of June 8, 1983, job code #422602. In point of fact, petitioner had adequate qualifications for each and every job for which he applied for in-house transfer. Petitioner had never had problems transferring from one group to another within defendants' company prior.

Prior to and following petitioner's denial of in-house transfer and being terminated from defendants' company on June 17, 1983, petitioner read in various newspaper advertisements for positions at defendants' company (Exhibit # 315); petitioner was qualified for each and every one of these positions.

After petitioner's termination and the filing of a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) Case # 092831489, the petitioner subpoenaed

his personal file. Petitioner found a document from a Mr. Gerald Hermann to Mr. Tong dated 2/16/83 (Exhibit # 59). The document was referencing times and dates in 1982 in which the petitioner had no knowledge of. Petitioner also found a document from a Mr. Ed Kulyeshie to Mr. Tong, which was dated 2/17/83, one day after Mr. Gerald Hermann's falsified document and referencing dates and times in 1982. Petitioner had no knowledge of these documents. Petitioner showed in court that Mr. Ed Kulyeshie was not even there on days in which he said petitioner was late to work (Exhibit # 60). Petitioner also showed time cards for dates in which Mr. Kulyeshie said petitioner was not there, but in fact Mr. Kulyeshie himself was out on "VACATION" (Exhibits # 210 and 67). Mr. Kulyeshie also requested that the petitioner be terminated from defendants' company (Exhibit # 60, last paragraph). The petitioner also found a document from a Mr. Paul Sterba submitted to Mr.

Tong (Exhibit # 61), submitted on the same day as Mr. Kulyeshie (2/17/83) and one day after Mr. Hermann's (Exhibit # 59). The petitioner had no knowledge of these documents until after his termination. A reading of these documents will illustrate to the court that they were not meant for petitioner to know of. Mr. Hermann's, Mr. Kulyeshie's and Mr. Sterba's documents were all addressed to Mr. Tong (Exhibits # 59, 60, 61 and 67).

Defendants response to the EEOC charge was that one employee was hired into the department one day before petitioner's termination 6/16/83 (Exhibit # 229) and one after petitioner's termination on 6/18/83. Defendants also stated in response to the EEOC complaint that all false information was purged from petitioner's personnel file, when in fact the defendant had already stated in response to petitioner's grievance to the company that nothing would be removed (Exhibit # 71). Petitioner was denied transfer due to

falsified information in petitioner's personnel file. Petitioner had shown defendant that this information was false. The petitioner also showed in court that defendant also prevented petitioner from being rehired back into the department and back into the company (Exhibits # 102 and 83). Petitioner also showed that a white employee was not denied the right to be rehired back into the company. The petitioner also verified during trial that no one else was harassed for time and attendance from a Mr. Tong, Mr. Kulyeshie and Mr. Sugden. The petitioner was the only one in which defendants harassed and inflicted disparate treatment and disparate impact. The petitioner also verified in court that there is a difference in a Student engineering salary and an MTS, from a Mrs. Harrell, Mr. Tong and Mr. Kendall. The defendants failed to pay petitioner equal salary for comparable work which other MTS employees in comparable positions were earning. See petitioner's

Petition for Rehearing at Appendix F.

On August 15, 1983, the petitioner obtained another engineering position with a local major Aerospace firm and was paid equal pay for equal work. Petitioner has been given a salary raise for each and every year in which he has been employed, since his termination from HUGHES AIRCRAFT COMPANY on June 17, 1983.

REASONS FOR GRANTING WRIT

The Supreme Court has set forth the criteria for the resolution of an individual's disparate treatment, disparate impact claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, providing for injunctive and other relief against discrimination in employment, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, providing for equal rights of persons in every state and territory within the jurisdiction of the United States to make and enter into contract, alleging employment discrimination because of race or color, and under the Equal Pay Act, equal pay for equal work of the Fair Labor Standards Act of 1938, §§ 1 et seq.; 6(D) as amended 29 U.S.C.A. §§ 201 et seq.; 206(d); Civil Rights Act of 1964, § 703(a) (1) as amended 42 U.S.C.A. § 2000e-2(a) (1).

DISCRIMINATORY TERMINATION

Under the McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) in the discriminatory discharge context, the plaintiff must show (i) that he was within the protected class; (ii) that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance; and (iii) that his employer sought a replacement with qualifications similar to his own.

The plaintiff showed in the district court that he is within the protected class (Exhibit # 202). The plaintiff also established a prima facie that he was a satisfactory employee and the defendants articulated reason was only a pretextual. The defendants articulated reason was that the plaintiff was not adequately performing his job duties and had a long history of serious attendance problems.

The plaintiff has showed a pattern of the

defendants to fabricate and falsify the plaintiff's records. Going back to October 20, 1977, Mr. R. Tong and Mr. E. Peay fabricated and falsified the plaintiff's records by saying the plaintiff was late to work on various days (Exhibit # 14). The plaintiff informed the defendants that this was wrong. The plaintiff even showed the defendants that they were writing him up for being late on "SATURDAY", 10/15/77. The plaintiff even showed the defendants his pay check stub (Exhibit # 239) for the week worked and indicated to each of them that he did not work on Saturday or there would be overtime shown for the week ending. Defendants did nothing to correct their action after being shown they were wrong. The defendants used Exhibit # 14 as a pretext to falsify and justify the plaintiff's performance appraisal (Exhibits # 35 and 36), reported by Mr. E. Peay and Mr. R. Tong, dated October 1977 and reported by Mr. Cardella and Mr. Lemestre, dated March 1977.

The plaintiff showed a corroboration of falsified and fabricated documents used by the defendants as a pretext to discriminate and terminate the plaintiff. The plaintiff's performance appraisal for the year 1976 indicated that the plaintiff was working at an MTS level (Exhibit # 261). The plaintiff proved a prima facie case of disparate treatment by establishing proof of material facts supporting and inference of intentional discrimination to fabricate and falsify the plaintiff's records and to justify a poor performance appraisal. Under Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978) the burden of production has been met upon a showing of actions taken by the employer from which one can infer, if such actions remain unexplained. That it is more likely than not that such action was based upon race or another impermissible criterion.

The defendants use the pretext that Mr.

Chin completed a performance appraisal of the plaintiff (Exhibit # 19). Exhibit # 19 is not a performance appraisal. The plaintiff's performance appraisal for 1980 is shown as Exhibit # 18. Plaintiff's performance appraisal dated 3/5/80 states that he was performing the duties and having the responsibilities of an MTS. Defendants' Exhibit # 19 was an employee-supervisor communication exchange, which was the supervisor's input. The plaintiff (employee's) input is shown as Exhibit # 20. Exhibit # 20 supports the plaintiff's performance of Exhibit # 18. Mr. Chin's input was a pretext to discriminate and terminate.

The defendants use the pretext that Mr. Sugden completed a warning of attendance. In the District Court the defendant Mr. Sugden stated that he did not record this attendance. The plaintiff also indicated in Court that he never saw Exhibit # 46. The defendant used Exhibit # 46 as a pretext to discriminate and

terminate the plaintiff. The plaintiff proved a prima facie disparate treatment, disparate impact when plaintiff cross-examined Mr. Sugden and asked if he had written any one else up like me, the ANSWER WAS NO. Under the International Brotherhood of Teamsters v. United States, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977) the theory of liability is that an individual was singled out and treated less favorable than other similarly situated on account of race or any other criterion impermissible under the statute.

The defendants use the pretext that Mr. Ruysser completed a performance appraisal of the plaintiff (Exhibit # 21). Exhibit # 21 is not a performance appraisal, the plaintiff's performance appraisal for 1981 is shown as Exhibit # 266. The plaintiff's performance appraisal dated 3/17/81 indicates that the plaintiff was working at an MTS level with an excellent attitude and sense of responsibility

about his work. Defendants' Exhibit # 21 was an employee-supervisor communication exchange, which was the supervisor's input. The plaintiff's (employee's) input is shown as Exhibit 47 and supports the plaintiff's performance appraisal dated 3/17/81. Mr. Ruysser's input Exhibit # 21 and Mr. Sugden Exhibit # 46 was a pretext to discriminate and terminate the plaintiff. the plaintiff was never aware of Exhibit # 46 until after his termination. Mr. Sugden himself stated in the district court that Mr. Ruysser was not even qualified to determine if an employee's work was right or wrong. The plaintiff's performance appraisal dated 3/10/82 states that Berry'an (plaintiff) was superior in Knowledge, Productivity, Creativity, Quality and Judgment, signed by Mr. Sugden and Mr. T. Tong (Exhibit # 50).

The defendant Mr. T. Tong used the same pattern of fabricating and falsifying the plaintiff's records to create a pretext to discriminate and terminate the plaintiff. Mr.

T. Tong suspended the plaintiff on March 14, 1983 (Exhibit # 68). The plaintiff informed Mr. Tong that this suspension was wrong. The plaintiff showed the Court that on March 9, 1983 Mr. Tong was on "VACATION" (Exhibit # 211), a date in which Mr. Tong said the plaintiff was late to work. The plaintiff showed to the Court that Mr. Tong and several other people were changing the plaintiff's time card (Exhibit # 319). This was all done to justify the plaintiff's suspension. After changing the plaintiff's time card, the defendants then issued a new card (Exhibit # 323). The plaintiff even showed the defendants that he was randomly clocking in and out for the period the defendants said the plaintiff was suspended for (Exhibit # 213). The defendants suspended the plaintiff willfully, wantingfully, maliciously and with the intention to discriminate against the plaintiff because of his race. The defendats' used the pretext that the plaintiff misstated his time card.

The plaintiff had no need to falsify his time card to show that Mr. Tong was suspending him wrongfully. The plaintiff showed in the District Court that Mr. Tong was out on vacation when he said the plaintiff was late to work and that Mr. Tong and several others corroborated in changing his time card to justify plaintiff's suspension. The plaintiff proved a prima facie disparate treatment and disparate impact when plaintiff cross-examined Mr. Tong and asked, did you suspend any one else like me, THE ANSWER WAS NO. The defendant suspended the plaintiff only as a pretext to terminate; Furnco, supra, 438 U.S. at 576, 98 S.Ct. at 2949.

The defendant Mr. Gerald Hermann uses the pretext that the plaintiff was late to work on days in the summer of 1982 and dated the document 2/16/83 (Exhibit # 59). Mr. Hermann submitted this document to Mr. Tong without plaintiff's knowledge thereof on 2/16/83 and referencing times and dates for the summer of

1982 with no showing of plaintiff's knowledge thereof. The company policies and operating procedure is that any and all adverse information placed in employee's personnel file be documented and shown to the employee and signed by employee (Exhibit # 205). The plaintiff established a prima facie disparate impact under Grigg v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). A prima facie disparate impact case under Title VII may be established without any proof of intentional discrimination; where business practice, neutral on its face, is shown to have a substantial adverse impact on some group protected by Title VII, the plaintiff has made out a prima facie and rebuts the defendants pretext. Defendant Mr. Hermann placed false documents in plaintiff's personnel file without plaintiff's knowledge thereof (Exhibit # 59), Grigg v. Duke Power Co., supra.

The defendant Mr. Kulyeshie placed

falsified documents in the plaintiff's personnel file without plaintiff's knowledge thereof (Exhibits # 60 and 67). Mr. Kulyeshie submitted Exhibit # 60 to Mr. Tong without plaintiff's knowledge thereof on 2/17/83, one day after Mr. Hermann submitted Exhibit # 59 to Mr. Tong falsifying plaintiff's personnel record. Here again, the defendant is referencing times and dates during the summer of 1982 with no showing of plaintiff's knowledge thereof (Exhibit # 60). The defendant Mr. Kulyeshie went so far as to recommend David Berry'an's dismissal from work at HUGHES AIRCRAFT (Exhibit # 60, last paragraph). Mr. Sterba submitted Exhibit # 61 on 2/17/83 to Mr. Tong on the same day as Mr. Kulyeshie and one day after Mr. Hermann's Exhibit # 59. Exhibit # 67 shows that Mr. Kulyeshie was out on "VACATION" on days he said the plaintiff was late to work (Exhibits # 210 and 67). The plaintiff proved a prima facie disparate treatment and disparate impact when plaintiff

cross-examined Mr. Kulyeshie and asked if he had written any one else up like me, THE ANSWER WAS NO. Teamsters, supra; Grigg v. Duke Power Co., supra; and Furco, supra. Mr. Hermann, Mr. Kulyeshie and Mr. Sterba corroborated and falsified plaintiff's records which caused the plaintiff to be rejected for positions he applied for and eventually terminated from work. Teamsters, supra; Grigg, supra; and Furco, supra.

The plaintiff established a prima facie when the plaintiff showed the District Court that one employee was hired into the department a day before plaintiff's termination on 6/16/83 (Exhibit # 229) and one after plaintiff's termination on 6/18/83. The defendant uses the articulated reason that one was hired to work at another HUGHES facility; NO WAY!!! Each department at HUGHES hires their own people. The other pretext was that the other was a long-term Ku-Band employee. The plaintiff showed the District court that the

employee hired was transferred into the department (Exhibit # 229). The defendants' articulated reason was only a pretext.

Under McDonnell Douglas, supra, "If the employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same service and skills". The plaintiff established a prima facie and rebuts the defendants' pretext. The defendants also stated to the EEOC that all fabricated and falsified information was purged from the plaintiff's personnel file (Exhibits # 71 and 229), when in fact the defendants had already stated to the company that nothing would be removed (Exhibit # 71). The plaintiff has shown through a preponderance of the evidence and statistical data produced, a clear pattern of intentional discrimination. The defendants articulated reason was only pretextual and now rebutted. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000 et seq.; 42 U.S.C.A. § 1981.

DISCRIMINATORY TRANSFER

Under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), and Teamsters, supra, the plaintiff in Title VII trial must carry the initial burden under the statute of establishing a prima facie of racial discrimination. The plaintiff has shown: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected, and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.

The plaintiff showed in the District Court that he is a minority (Exhibit # 202). The plaintiff established a prima facie case when he applied for numerous positions within defendants' company (Exhibit # 299); reason for rejection; upon examination of personnel folder a long-term and repeated history of

lateness, leave without permission, absence was noted. He had been reprimanded and little change in attitude/behavior noted. (Exhibit # 287); reason for rejection; David has been requested to look for more suitable work by the other department manager (Mr. Tong) in this laboratory. It is the general consensus that he is not adaptable to Space and Communication System Text, the plaintiff was qualified for this position. The plaintiff was rejected due to discrimination. (Exhibit # 303); reason for rejection: all hardware oriented. (Exhibit # 294); reason for rejection: need more hardware experience. (Exhibits # 289 and 290); reason for rejection: personnel records do not support requirements for job. Plaintiff was applying for a trainee position and rejected. Despite plaintiff's qualifications, plaintiff was rejected for each of these positions. After plaintiff's rejection of Exhibit # 289, job announcement remained open and the employer continued to

seek applications from persons of plaintiff's qualifications. Exhibit # 289 was applied for on 9/29/82 and 4/27/83 position remained open until at least June 8, 1983 (Exhibits # 289 and 290).

The plaintiff proved his prima facie case under McDonnel, supra; and Teamsters, supra, and rebuts the defendants' pretext of termination for unsatisfactory workmanship. The defendants' pretext was based on fabrication and falsification of the plaintiff's records. The plaintiff proved his prima facie of disparate treatment and disparate impact.

DISCRIMINATORY PAY

The Equal Pay Act Standards apply in Title VII suits when plaintiff raises a claim of Equal Pay; Fair Labor Standards Act of 1938, §§ 1 et seq.; (6d) as amended 29 U.S.C.A. §§ 201 et seq.; 206(d); Civil Rights Act of 1964, 703(a)(1) as amended 42 U.S.C.A. § 2000e-2(a)(1). The plaintiff proved a prima facie violation of Equal Pay Act. The plaintiff showed the District Court that his actual performance and content, not job titles, classification or description, was at a higher level MTS than paid (Exhibits # 261, 18, 266, 50 and 74). The plaintiff also verified in court that there is a difference in a student engineer's salary and an MTS, from a Mrs. Harrell, Mr. Tong and Mr. Kendall. The plaintiff was classified as a student engineer and performing the task of an MTS actual job performance and content; Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979) (aff'd), 452 U.S. 161, 101 S.Ct. 2242 (1982).

The defendants' reason for not paying the plaintiff Equal Pay was only pretextual. The plaintiff proved a prima facie when he showed the court that he was passed up for his salary raise in the year 1982 and 1983 (Exhibits # 49 and 280). The plaintiff has a showing that links their conduct with the employer's action. The defendants' reason was only a pretext. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

DISCRIMINATORY HARASSMENT

The plaintiff proved a prima facie case of harassment through a preponderance of the evidence that when Mr. Tong suspended the plaintiff wrongfully, the defendant knew in advance that plaintiff had done no wrong (Exhibit # 68). After the termination of plaintiff the defendants recommended to the company that the plaintiff is NOT to be rehired back into the company (Exhibit # 83). The defendant did not recommend in precluding white employees from being rehired back into the company' prima facie established. The defendants' reason was only pretextual; Teamsters, supra. The plaintiff proved a prima facie violation of Title VII when Mr. Tong, Mr. Hermann, Mr. Kulyeshie, Mr. Chin, Mr. Sugden and Mr. Ruysser falsely accused the plaintiff of time and attendance. Plaintiff proved a prima facie of harassment when Mr. Ruysser was appointed supervisor, knowing that he was not qualified to be supervisor, but only placed in the position to

harass the plaintiff, court Record. The plaintiff showed that defendants Mr. Sugden, Mr. Tong and Mr. Kulyeshie did not falsify any one else's records but the plaintiff's, court records. The plaintiff has made out a prima facie of disparate treatment and disparate impact; Teamsters, supra.

The ultimate establishment of prima facie employment discrimination has been proven through a preponderance of evidence that plaintiff was not promoted or dismissed under conditions which, more likely than not, were based upon impermissible racial considerations. Plaintiff has shown that the incidents of harassment have shown long patterns of creating or condoning an environment at the work place which significantly and adversely affects the psychological well-being of plaintiff because of his race; McDonnell, supra.

The plaintiff has shown more than a few isolated incidents of harassment having

occurred to establish a violation of Title VII claims. 42 U.S.C.A. § 1981, Civil Rights Act of 1866, Civil Rights Act of 1964, § 701 et seq.; 718, as amended, 42 U.S.C.A. 2000e et seq.; 2000e-17.

CONCLUSION

For the foregoing reasons, petitioner David Berry'an respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Of Counsel
LATHAM & WATKINS
Deanne P. George
Keith M. Parker
701 "B" St. #2100
San Diego, Calif.
92101-8197
(714) 752-9100
September 26, 1987

David Berry'an
606 Levering Ave. #216
Los Angeles, Calif. 90024
(213) 824-1982
Petitioner
In Propria Personae

DAVID BERRY'AN
September 26, 1987

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BERRY'AN, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, a corporation, THOMAS W. TONG, an individual, A.H. RUYSSER, an individual, EDWARD KULYESHIE, an individual, GERALD HERMANN, an individual, and Does 1 through 10, Defendants-Appellees.	)	No. 86-5521 DC No. CV 84-6158-WDK M E M O R A N D U M*

Appeal from the United States District Court
for the Central District of California
Honorable William D. Keller,
District Judge Presiding

Submitted: December 12, 1986 -
San Francisco, California**
Filed: March 19, 1987

Before: BARNES, SKOPIL and CANBY, Circuit Judges.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. Rule 3(f).

The district court's judgment is affirmed. Barry'an failed to establish the ultimate issue of discrimination with respect to all or any of this Title VII claims and, therefore, the district court's judgment was not clearly erroneous. See Castillas v. United States Navy, 735 F.2d 338, 343-44 (9th Cir. 1984). Moreover, this action was based on frivolous grounds and, therefore, the district court did not abuse its discretion in awarding Hughes attorney fees. See Mitchell v. Los Angeles County Superintendent of Schools, 805 F.2d 844, 847-48 (9th Cir. 1986).

Berry'an was hired by Hughes Aircraft Company ("Hughes") on June 2, 1975 and worked for four divisions within Hughes before his termination. At the time Berry'an was hired, he made misrepresentations about his academic credentials. While employed at Hughes, Berry'an received verbal and written warnings

about his attendance and work habits.[1] He was warned that he would be terminated if he did not improve his allegedly poor work habits.

On September 22, 1982, Berry'an was asked to seek alternative employment within or outside Hughes. thereafter, he applied for employment in other departments within Hughes and also for employment outside Hughes. Hughes did not transfer him to another department. While seeking another job, Berry'an applied for jobs beyond his qualifications.

On March 14, 1983, Berry'an was suspended for three days without pay for continued failure to correct his allegedly poor work

---

[1] Berry'an was warned to correct his deficient work habits as follows: appraisal report by Cardella and Lemestre, March 1977; appraisal report by Peay, October 1977; appraisal report by Chin, September 1980; written warning by Sugden, August 1981; appraisal report by Ruysser, September 1981; appraisal report by Tong, July 1982, Memorandum to Tong by Sterva, February 1983, written warning by Tong, February 1983.

habits. Berry'an filed a complaint with Hughes and after an investigation, a Hughes Employee Relations Representative concluded that his suspension for poor attendance was justified. Thereafter, Hughes' management decided to discharge Berry'an if he did not find alternative employment before June 17, 1983.

Several weeks after his suspension, Berry'an received an allegedly derogatory newspaper excerpt through Hughes' inter-office mail.

From 1976 to 1982, Berry'an received an annual weekly salary increase. His salary increase averaged approximately ten percent each year. In May 1982, Berry'an was promoted and awarded a special salary increase of twenty-six percent.

Hughes discharged Berry'an on June 17, 1983. He filed a charge id discrimination with the Equal Employment Opportunity Commission (EEOC) in July 1983. In June 1984,

the EEOC issued Berry'an a right to sue letter. On August 8, 1984, Berry'an filed a pro se complaint against Hughes. After a bench trial, the district court granted judgment for Hughes, and adopted Hughes' proposed findings of fact and conclusions of law. On February 21, 1986, the district court granted Hughes' motion for $10,000 in attorney fees. Berry'an timely appeals.

There are two issues before this court:

1. Did the district court clearly err in failing to find that Hughes racially discriminated against Berry'an?

2. Did the district court abuse its discretion in awarding Hughes attorney fees?

On each issue we hold there was no error.

I

Discrimination Claims

A. Standard of Review

Since this case was fully tried, we review the district court's factual findings as to Title VII discrimination under the clearly erroneous standard. Casillas, 735 F.2d at 342. Appellate review focuses not upon whether the prima facie case was established but upon the ultimate questions of discrimination. Id. at 343-344. The ultimate burden of proof, despite the shift in the burden of production, remains with the employee. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

B. Termination

Berry'an contends that he was terminated because of his race and that he has established the prima facie requirements for discriminatory discharge. He states that he is a member of the black race. He argues he was a satisfactory employee when discharged

and that he was replaced by a white worker. Moreover, Berry'an asserts that Hughes fabricated evidence of tardy attendance and deficient work habits.

To establish a prima facie case of discriminatory discharge, Berry'an must prove that he belongs to a racial minority, that he was performing satisfactorily when he was terminated, and that Hughes sought a replacement with qualifications similar to his own. Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1075 (9th Cir. 1986).

The district court properly found that Berry'an was neither performing satisfactorily nor replaced. Other than his own testimony, Berry'an offered no evidence that Hughes falsely altered his records. Hughes' personnel file on Berry'an chronicled the numerous warnings he received concerning his deficient work habits. In addition, Berry'an misstated his time cards and had difficulty working with others. Moreover, Hughes did not attempt to

replace Berry'an. Thus, Berry'an did not satisfy the requirements for establishing discriminatory termination. See id.

C. Transfer

Berry'an contends that he applied for numerous positions within Hughes but was denied a transfer because of his race. He states that he was qualified for the positions for which he applied. In addition, Berry'an states that Hughes, after refusing his application, continued to seek applications from persons with his same qualifications.

To establish a prima facie case of discrimination, Berry'an was required to show that he belongs to a racial minority, that he applied for a position for which he was qualified, that he was rejected, and that thereafter the position remained open and Hughes continued to seek applicants with qualifications similar to his own. Mitchell, 805 F.2d at 846 (citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

Alternatively, Berry'an may establish a prima facie case by offering evidence that creates an inference that Hughes based its employment decision on discriminatory criteria. Id. (citing Teamsters v. United States, 431 U.S. 324, 358 (1977). Once Berry'an establishes a prima facie case, Hughes's burden is to articulate a legitimate nondiscriminatory reason for rejecting Berry'an. Id. Then Berry'an must prove that Hughes' articulated reason was a pretext. Id. (citing McDonnell Douglas, 411 U.S. at 807).

The district court properly found that Hughes did not deny Berry'an a transfer position because of his race. The record reveals that Berry'an either was not qualified for the positions for which he applied or that the positions were closed. Moreover, even if he had established a prima face case, Hughes' articulated reason for not selecting Berry'an was not pretext because Berry'an was an unsatisfactory employee.

D. Equal Pay

Berry'an alleges that salary decisions made by Hughes in 1982 and 1983 were based on race. He also states that he performed tasks at a level higher than that for which he was paid.

In his wage discrimination claim, however, Berry'an failed to establish the ultimate issue of race discrimination. See EEOC v. Inland Marine Industries, 729 F.2d 1229, 1234 (9th Cir.), cert. denied, 469 U.S. 855 (1984). Even though his assigned duties were greater than his classification requirements, Hughes awarded Berry'an lower salary increases because he was not dependable, not punctual, and maintained generally poor work habits.

E. Harassment

Berry'an contends he suffered a continuing and extensive course of harassment of which Hughes was area and failed to take reasonable steps to remedy. He alleges that

he was harassed because: (1) he received a derogatory newspaper excerpt; (2) he was suspended; and (3) his supervisor recommended that he not be rehired. He also argues that he was continually harassed regarding his work habits.

To succeed on a claim of discriminatory harassment, Berry'an must prove that he was subjected to a continuing and extensive course of harassment, and that Hughes failed to take reasonable steps to remedy the harassment. Silver v. KCA, Inc., 586 F.2d 138, 141-42 (9th Cir. 1978).

Except for his own testimony, Berry'an has offered no evidence that Hughes falsely accused him of maintaining deficient work habits. Hughes, however, presented testimony of numerous witnesses supporting the allegation that Berry'an maintained poor work habits. In addition, after conducting an investigation an employee representative found Berry'an's suspension justified. therefore,

the suspension and recommend;ation do not show that Berry'an was harassed. Moreover, although Berry'an received a derogatory newspaper excerpt through Hughes' interoffice mail, he concedes that he received no other derogatory documents and that he heard no derogatory remarks while employed by Hughes. Thus, because Berry'an was not subject to extensive or continuous harassment, he has not established a claim for harassment.

II

Attorney Fees

The award of attorney fees falls within the discretion of the trial court and will not be disturbed absent an abuse of discretion. Mitchell, 805 F.2d at 846.

In requesting attorney fees on appeal, Berry'an implicitly argues that Hughes was not entitled to attorney fees below.[2]

Attorney fees may be awarded against a plaintiff in a Title VII case where the district court finds the claim "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christianburg Garment Co.

[2] Berry'an argues that he is entitled to attorney fees on appeal because he has established various Title VII and 42 U.S.C. § 1981 violations. As previously discussed, however, Berry'an has failed to establish the ultimate issue of discrimination, and therefore, because he is not a prevailing party he is not entitled to attorney fees on appeal. 42 U.S.C. § 2000e-5(k). Hughes does not seek attorney fees at this time but states that if it prevails on appeal it may seek fees pursuant to 42 U.S.C. § 2000e-5(k).1.

v. EEOC, 434 U.S. 412, 422 (1978); Mitchell, 805 F.2d at 847-48.

Here the district court properly awarded Hughes attorney fees. Berry'an based his action on frivolous grounds and misrepresentations. He misrepresented his qualifications and credentials, and misstated his time cards. Since this action resulted in the needless expenditure of litigation expenses, the district court did not abuse its discretion in awarding Hughes attorney fees. See id.

The district court's judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BERRY'AN, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, a corporation, THOMAS W. TONG, an individual, A.H. RUYSSER, an individual, EDWARD KULYESHIE, an individual, GERALD HERMANN, an individual, and Does 1 through 10, Defendants-Appellees.	)	No. 86-5521 DC No. CV 84-6158-WDK O R D E R

Before: BARNES, SKOPIL and CANBY, Circuit Judges.

Appellant's petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID BERRY'AN, Plaintiff, v. HUGHES AIRCRAFT COMPANY, a corporation, Defendant.	NO. CV 84-6158-WDK JUDGMENT

This action came on for trial before the Court, the Honorable William D. Keller, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff shall take nothing by his action against Defendant.

DATED: December 4, 1985.

(-)

William D. Keller, Judge
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BERRY'AN,	)	No. 86-5521
	)	
Plaintiff-Appellant,	)	DC CV-84-6158-WDK
	)	
vs.	)	ORDER
	)	
HUGHES AIRCRAFT CO., et al.,	)	
	)	
Defendants-Appellees.	)	

Appellant's motion of May 27, 1986, for leave to file the opening brief late is granted. The brief already received will be filed.

This order is subject to reconsideration by a judge if any opposition is filed within ten (10) days of the entry of the order.

For the Court:

(-)

Grant L. Kim
Motions Attorney/Deputy Clerk
Local Rule 22

MA 9/3/86

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BERRY'AN, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, a corporation, THOMAS W. TONG, an individual, A.H. RUYSSER, an individual, EDWARD KULYESHIE, an individual, GERALD HERMANN, an individual, and Does 1 through 10, Defendants-Appellees.	)	No. 86-5521 DC No. CV 84-6158-WDK O R D E R

Before: BARNES, Circuit Judge.

Appellant's motion for stay of mandate is GRANTED.

No. 86-5521

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

DAVID BERRY'AN, an individual, Plaintiff-Appellant, vs. HUGHES AIRCRAFT COMPANY, a corporation, Thomas W. Tong, an individual, A.H. Ruysser, an individual, Edward Kulyeshie, an D.M. Sugden, an individual, Gerald Hermann, an individual, and Does 1 through 10, inclusive, Defendants-Appellees.	No. 86-5521 DC# CV-84-6158-WDK Central California PLAINTIFF-APPELLANT PETITION FOR REHEARING

On Appeal From the Central District
of California
NINTH CIRCUIT

DAVID BERRY'AN
606 Levering Ave. #216
Los Angeles, Calif. 90024
(213) 824-1982
Plaintiff
In Propria Personae

Of Counsel
LATHAM & WATKINS
Deanne P. George
701 "B" Street,
Suite 2100
San Diego, Calif. 92101-8197
(714) 752-9100
April 2, 1987

In the Opinion Of The Petitioner The Court Has Misapprehended The Following Material Facts And Conclusions Of Law, In Finding That Hughes Did Not Discriminate Against Plaintiff Because Of His Race.

1. Hughes Did Terminate Plaintiff Because Of His Race

The Plaintiff contends that he suffered Disparate Treatment and disparate Impact by terminating him on June 17, 1983, because of his race. The Defendants (Hughes) articulated reason was only a pretextual.

The Ninth Circuit Has held that the criteria set forth by the Supreme Court for the resolution of and individual Disparate Treatment, Desparate Impact claim under Title VII also apply to section 1981, Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, providing for injunctive and other relief against discrimination in employment, and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

The plaintiff did succeed in establishing a prima facie Disparate Treatment claim on his 1981 claim, and that the defendants articulated reason was only a pretextual.

Under Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1075 (9th Cir. 1986) (citing McDonnell Douglas v. Green, 411 U.S. 792, 802n. 13, 93 S.Ct. at 1824 n. 13 (1973)). In the discriminatory discharge context, the plaintiff must show (i) that he was within the protected class; (ii) that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance; and (iii) that his employer sought a replacement with qualifications similar to his own.

The plaintiff showed in the district court that he is within the protected class (Brief for Plaintiff-Appellant at 14(3) Appendix #I, Exhibit 202). The plaintiff also establish a prima facie that he was a satis-

factory employee and the defendants articulated reason was only a pretextual. The defendants articulated reason was that the plaintiff was not adequately performing his job duties and had a long history of serious attendance problems. The plaintiff asserts that the following material facts have been overlooked.

The plaintiff showed a pattern of the defendant to fabricate and falsify the plaintiffs records. Going back to October 20, 1977, Mr. R. Tong and Mr. E. Peay fabricated and falsified the plaintiffs record by saying the plaintiff was late to work on various days (RT 71 (23)-72 (1)) (Brief for Plaintiff-Appellant At Appendix #V, Exhibit 14). the plaintiff informed the defendants that his was wrong (RT 72 (5). The plaintiff even showed the defendants that they were writing him up for being late on "SATURDAY" (10/15/77) (RT 73 (7)-(16)). The plaintiff even showed the defendants his pay check stub

(RT 73 (17)-(25)) (Brief for Plaintiff-Appellant at Appendix #VI, Exhibit 239), for the week worked and indicated to each of them that he did not work saturday or there would be overtime shown for that week ending. Defendants did nothing to correct there action, after being shown they were wrong. The defendants uses Exhibit 14 as a pretextual to Falsify and justifie the plaintiffs performance appraisal (RT 277) (13) Exhibit 35, 36) reported by Mr. E. Peay and Mr. R. Fong dated October 1977 and reported by Cardella and Lemestre dated March 1977. the plaintiff has shown a corrobration of falsified and fabricated documents used by the defendants as a pretext to discriminate and terminate the plaintiff. The plaintiffs performance appraisal for the year 1976 indicated That the plaintiff was working at and (MTS) Level (RT 36 (7)-(13)), (Brief for Plaintiff-Appellant at Appendix #VIII, Exhibit 261). The plaintiff prove a prima facie case of disparate

treatment by establishing proof of Material facts supporting an inference of intentional discrimination to fabracte and falsifie the plaintiffs record and to justifie a poor performance appraisal. Under Furnco Construction Corp. v. Waters 438 U.S. 567, 577, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978), Sengupta v. Morrison-Knudsen Co. Inc. Supra; The burden of production has been met upon a showing of actions taken by the employer from which one can infer, if such actions remain unexplained. That it is more likely than not that such action was based upon race or another impermissible criterion.

The defendants uses the pretext that Mr. Chin completed a performance appraisal of the plaintiff (RT 346 (11) Exhibit 19). Exhibit 19 is not a performance appraisal, the plaintiffs performance appraisal for 1980 is shown as Exhibit 18 (Brief for Plaintiff-Appellant at Appendix VIII Exhibit 18) (RT 74 (23). Plaintiff performance appraisal dated

3/5/80 states that he was performing the duties and having the responsibilities of a member of the technical staff (MTS) (RT 75 (1)-(25)). Defendants Exhibit 19 was and Employee-Supervisor Communication exchange, which was the supervisors input. The plaintiff (Employee's) input is shown in (Brief for Plaintiff-Appellant at Appendix IX Exhibit 20). Exhibit 20 supports the plaintiffs performance appraisal of exhibit 18. Mr. Chin input was a pretext to discriminate and terminate.

The Defendants uses the pretext that Mr. Sugden completed a warning of attendance. In district court the defendant (Mr. Sugden) stated that he did not record this attendance (RT 476 (8)). The plaintiff also indicated in court that he never saw exhibit 46 (RT 308 (16)-24). The defendant used exhibit 46 as a pretext to discriminate and terminate the plaintiff. The plaintiff had no knowledge of this exhibit 46. The plaintiff proved a prima

facie disparate treatment disparate impact when plaintiff cross examine Mr. Sugden and ask if he had written any one else up like me, The answer was NO. (RT483 (11)-(14)). Under International Brotherhood of Teamsters v. United States, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977). The Theory of liability is that an individual was singled out and treated less favorable than other similary situated on account of race or any other creterion permissible under the statue.

The defendants uses the pretext that Mr. Ruysser completed a performance appraisal of the plaintiff (RT 494 (16) exhibit 21). Exhibit 21 is not a performance appraisal. The plaintiff performance appraisal for 1981 is shown in (Brief for Plaintiff-Appellant at Appendix VIII, Exhibit 266). The plaintiffs Performance appraisal dated 3/17/81 indicates that plaintiff was working at and (MTS) level with and excellent attitude and sense of responsibility about his work (RT 37(7)).

Defendants exhibit 21 was and employee-supervisor communication exchange, and exhibit 21 was the supervisors input. The plaintiff (employee) input is shown in (Brief for Plaintiff-Appellant at Appendix IX, Exhibit 47). Exhibit 47 supports the plaintiffs performance appraisal dated 3/17/81. Mr. Ruyssers input exhibit 21 and Mr. Sugden exhibit 46 was a pretext to discriminate and terminate the plaintiff. The plaintiff was never aware of exhibit 46 until after his termination (RT 308 (21)-(24) exhibit 46). Mr. Sugden himself stated that Mr. Sugden himself stated that Mr. Ruysser was not even qualified to determine if and employee"s work was right or wrong (RT 480 (6) -(8). The plaintiff performance appraisal dated 3/10/82 states that Berry'an was superior in knowledge, productivity, creativity, quality and judgement, sign by Mr. Sugden and Mr. T. Tong (RT 37 (15)-(25) Exhibit 50), (RT 563 (14)-(25) Exhibit 50), (Brief for Plaintiff

Appellant at Appendix VIII, Exhibit 50).

The defendant Mr. T. Tong used the same pattern of fabracating and falsifing the plaintiffs record to create a pretext to discriminate and terminate the plaintiff. Mr. Tong suspended the plaintiff on March 14, 1983 (RT39) (1) Exhibit 68), (Brief for Plaintiff-Appellant at Appendix VII, Exhibit 68). The plaintiff informed Mr. Tong that this suspention was wrong. The plaintiff showed the Court that on March 9, 1983 that Mr. Tong was on "Vacation" (RT 49 (1) - (25) Exhibit 211), (Brief for Plaintiff-Appellant at Appendix VII, Exhibit 211), a date in which Mr. Tong said the plaintiff was late to work. The plaintiff showed to the Court that Mr. Tong and several other people were changing the plaintiffs time card (RT 548 thru 551, Exhibit 319), (Brief for Plaintiff-Appellant at Appendix VII, Exhibit 319), this was all done to justifie the plaintiffs suspension. After changing the plaintiff time card the

defendants then issued a new time card (RT 551 (8)-(25), 552 (1)-(25), 608 (1)-(17) Exhibit 323), (Brief for Plaintiff-Appelalnt at Appendix VII, Exhibit 323). The defendants suspended plaintiff willfully, wantingfully, and maliciously and with the intention to discriminate against the plaintiff because of his race. The defendants used the pretextual that the plaintiff mistated his time card. The plaintiff had no need to falsified his time card to show that Mr. Tong was suspending him wrongfully. The plaintiff showed in the district court that Mr. Tong was out on vacation when he said the plaintiff was late to work and that Mr. Tong and several others corrobrated in changing his time card to justified plaintiff suspension. The plaintiff proved a prima facie disparate treatment and disparate impact when plaintiff cross examine Mr. Tong and ask, did you suspend any one else like me (RT 568 (3)) the answer was NO. The defendants suspended the plaintiff only as a

pretext to terminate. Furnco, Supra; 438 U.S.; at 576, 98 S. Ct. at 2949.

The defendant Mr. G. Hermann used the pretext that the plaintiff was late to work on days in the summer of 1982 and dated 2/16/83 (RT 124 (7-13), Exhibit 59), (Brief for Plaintiff-Appellant at Appendix III, Exhibit 59). Mr. Hermann submitted this document to Mr. Tong without the plaintiffs knoweledge there of on 2/16/83 and referenceing times and dates for the summer of 1982 with no showing of plaintiff knowledge there of. The company policies and operating procedure is that any and all adverse information place in employment personnel file be documented and shown to employee and sign by employee (RT 8 (15-25) Exhibit 203). The plaintiff establish a prima facie "disparate Impact" under Grigg v. Duke Power Co.; 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L.Ed.2d, 158 (1971). A prima facie disparate impact case under Title VII may be established without any proof of

intentional discrimination; where business practice, neutral on its face, is shown to have a substantial, adverse impact on some group protected by Title VII, plaintiff has made out a prima facie case and rebuts the defendants pretext. Defendant Mr. Hermann place false document in plaintiff personnel file without plaintiff knowledge thereof (RT 82 (3)-(25) Exhibit 59), (Brief for Plaintiff-Appellant at Appendix III, Exhibit 59), Grigg v. Duke Power Co; Supra.

The defendant Mr. E. Kulyeshie place falsified documents in the plaintiff's personnel file without plaintiff knowledge thereof, (RT 6 (8) Exhibit 60), (Brief for Plaintiff-Appellant at Appendix IV, Exhibit 60) and (RT 200 (21) Exhibit 67), (Brief for Plaintiff-Appellant at Appendix IV, Exhibit 67). Mr. Kulyeshie submitted Exhibit 60 to Mr. Tong without the plaintiff knowledge thereof on 2/17/83 one day after Mr. Hermann submitted Exhibit 59 to Mr. Tong falsifying

the plaintiff personnel record. Here again the defendant is referencing times and dates during the summer of 1982 with no showing the plaintiffs knowledge thereof. The defendant Mr. Kulyeshie went so for as to recommend David Berry'an dismissal from work at Hughes Aircraft (RT 83 (16) Exhibit 60) last paragraph (RT 6 (14) Exhibit 60) last paragraph (RT 6 (14) Exhibit 60). Mr. Sterba submitted exhibit 61 on 2/17/83 (RT 84 (4) Exhibit 61) to Mr. Tong on the same day as Mr. Kulyeshie and one day after Mr. Hermanns exhibit 59. Exhibit 67 shows that Mr. Kulyeshie was out on "Vacation" on days he said the plaintiff was late to work (RT 212 (13) Exhibit 210, 67) (Brief fo Plaintiff-Appellant, Appendix VII, Exhibit 210, Appendix IV, Exhibit 67). The plaintiff prove a prima facie disparate treatment and disparate impact when plaintiff cross Mr. Kulyeshie and ask if he had written any one else up like me, the answer was NO, (RT 223

(17)-(20) Exhibit 67 and 60). Mr. Hermann, Mr. Kulyeshie and Mr. Sterba corrobrated and falsified the plaintiff records which caused the plaintiff to be rejected for position he applied for and eventurely terminated from work. Furco; Supra;.

The plaintiff establish a prima facie when the defendants showed the district court that one employee was hired into the department a day before plaintiff termination on 6/16/83 (RT 596 (10)-(22) Exhibit 229) and one after plaintiff termination on 6/18/83 (RT 597 (13) Exhibit 229). The defendant uses the articulated reason that one was hired to work at another Hughes facility. NO WAY!!! each department at Hughes hires there own people. The other pretextual was that the other was a long-term Ku-Band employees. The plaintiff showed the district court that the employee hired was transferred into the department (RT 597 (3)-(13) Exhibit 229). The defendant articulated reason was only a pretext.

Under McDonnell Douglas; Supra; "If the employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same service and skills". The plaintiff establish a prima facie and rebuts the defendants pretextual. The defendants also stated to the EEOC that all fabracted and falsified information was purge from the plaintiff personnel file (RT 588 (12)-2(25) 589 (1)-(4) Exhibit 71 and 229). When in-fact the defendant had already stated in response to plaintiffs grievence to the company that nothing would be removed (RT 589 (1)-(25) Exhibit 71). The plaintiff has showed through a preponderance of the evidence and statistical data produce, a clear pattern of intentional discrimination. The defendants articulated reason was only pretextual and now rebutted. Civil Rights Act of 1964, §701 et seq; 42 U.S.C.A. §2000 et seq; 42 U.S.C.A. §1981.

2. Hughes Did Deny Plaintiff a Transfer Because of Race

Under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), Teamsters; Supra. The plaintiff in Title VII trial must carry the initial burden under the statue of establishing a prima facie case of racial discrimination. The plaintiff has shown; (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff qualifications.

The plaintiff showed in the district court that he is a minority (Brief for the plaintiff-Appellant at 14(3), Appendix #I, Exhibit 202). The plaintiff establish a prima facie case when he applied for numberous positions within defendants company. See (Brief

for Plaintiff-Appellant, Appendix II Exhibit 299), (RT 592 (11) Exhibit 299): reason for rejection "upon examination of personnel folder a long-term and repeated history of lateness, leave without permission, absense was noted he had been reprimanded in lettle change in asttitude/behavior noted". Exhibit 287 (RT 52 (6)); (Brief for Plaintiff-Appellant at Appendix II Exhibit 287) : reason for rejection "David has been requested to look for more suitable work by the other department manager (Mr. Tong) in this Laboratory. It is the general concensus that he is not adaptable to space and communication system tests, (RT30 (6)-(14) the plaintiff was qualified for this position". The plaintiff was rejection do to discrimination. Exhibit 303 (RT 52 *18); (Brief for Plaintiff-Appellant at Appendix II, Exhibit 303): reason for rejection "all hardware oriented". Exhibit 294 (RT 52 (12)); (Brief for Plaintiff-Appellant at Appendix II, 294):

reasosn for rejection "Need more hardware experience". Exhibit 296 (RT 52 (12)); (Brief for Plaintiff-Appellant at Appendix II, Exhibit 296): reason for rejection "Need more hardware experience. Exhibit 289 (RT 24(1), 52 (9) Exhibit 289 and 290); (Brief for Plaintiff-Appellant at Appendix II Exhibit 289 and 290): reason for rejection "personnel record do not support requirements for job", plaintiff was applying for a trainee position and rejected. Despite plaintiff qualification, plaintiff was rejected for each of these positions. After plaintiff rejection of Exhibit 289 job announcement remained open and the employer continued to seek applications from persons of plaintiff qualification. Exhibit 289 (RT 24 (11)-25 (22) was applied for on 9/29/82 and 4/27/83 position remained open until at least june 8, 1983; see (Brief for Plaintiff-Appellant at Appendix II Exhibit 289 and 290).

The plaintiff proved his prima facie

under Teamsters; Supra; and rebuts the defendants pretext of termination for unsatisfactory workmanship. The defendants pretext was based on fabraction and falsification of plaintiff records. The plaintiff proved his prima facie of disparate treatment and disparate impact.

3. Hughes Did Deny Plaintiff A Salary Increase Because of His Race

The Equal Pay Act standards apply in Title VII suits when plaintiff raise a claim of Equal Pay; Fair Labor Standards Act of 1938, §§ et seq; 6(d) as amended 29 U.S.C.A. §§ 201 et seq; 206(d); Civil Rights Act of 1984, § 703(a)(1) as amended 42 U.S.C.A. § 2000e-2(a)(1). The plaintiff proved a prima facie violation of the Equal Pay Act. The plaintiff showed the district court that his actual performance and content, not job titles, classification or discriptions, was at a higher level (MTS) than payed. (Brief for Plaintiff-Appellant at

Appendix VIII Exhibit 261, 18, 266 , 50 and 74). The plaintiff also verified in court that there is a difference in student engineer salary and a member of the technical staff (MTS); EEOC v. Inland Marine Industries, 729 F.2d 1229, 1234 (9th Cir.). Mr. Harrell (RT 597 (19) - (21)), Mr. Tong (RT 543 (16)-(18)), Mr. Kendall (RT 605 (9)-(13). The plaintiff was classified as a student engineer and performing the task of a (MTS) actual job performance and content Gunther v. County of Washington, 623 F.2d 1303, (9th Cir. 1979), aff'd, 452 U.S. 161, 101 S. Ct. 2242 (1981). The defendants reason for not paying the plaintiff Equal pay was only pretextual. The plaintiff proved a prima facie when he showed the court that he was passed up for his salary raise in the year 1982 and 1983 (RT 54 (13) Exhibit 49) (Brief for Plaintiff-Appellant at Appendix X, Exhibit 49), (RT 56 (4) Exhibit 280). (Brief for Plaintiff-Appellant at Appendix X Exhibit 280). The plaintiff has a

showing that links their conduct with the employer's action, Miller v. Williams, 590 F.2d 317, 320 (9th Cir. 1979). EEOC; Supra. The plaintiff disparate treatment and disparate impact the defendants reason was only a pretext. Civil Rights Act of 1964, § 701 et seq; 42 U.S.C.A. § 2000e et seq, 42 U.S.C.A. § 1981.

4. Hughes Did Harass Plaintiff

The plaintiff proved a prima facie of harassment through a preponderance of the evidence that when Mr. Tong suspended the plaintiff wrongfully, the defendant knew in advance that plaintiff had done no Wrong, (RT 39(1) Exhibit 68). After the Termination of plaintiff the defendant recommended to the company that the plaintiff is NOT to be rehired back into the department and NOT to be rehired back into the company (RT 558 (22) Exhibit 83); (Brief for Plaintiff-Appellant at Appendix X Exhibit 83). The defendant did not recomment in precluding white employee's from

being rehired back in to company, prima facie establish. The defendants reason was only a pretextual; Teamsters;Supra, Plaintiff proved a prima facie violation of Title VII when Mr. Tong, Mr. Hermann, Mr. Kulyeshie, Mr. Chin, Mr. Sugden and Mr. Ruysser falsely accused the plaintiff of time and attendance. Plaintiff proved a prima facie of harassment when Mr. Ruysser was appointed supervisor, knowing that he was not qualified to be supervisor, but only place in the position to harass the plaintiff (RT 498(2)). (RT 480(6)). The plaintiff showed that Mr. Sugden did not falsify any one else records (RT 483(11)-(14), Mr. Tong (RT 568 (3)), Mr. Kulyeshie (RT 223 (17)-(20)). The plaintiff has made out a perma facie of disparate treatment and disparate impact, Silver v. KCA, Inc., 586 F.2d 138, 141-42 (9th Cir. 1978), and Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979).

The ultimate establishment of prima

facie employment discrimination has been proven through a preponderance of evidence that plaintiff was not promoted or dismissed under conditions which, more likely that not, were based upon impermissible racial considerations. Plaintiff has shown that the incidents of harassment have shown long patterns of creating or condoning and environment at the work place which significantly and adversely affects the psychological well-being of plaintiff because of his race. McDonnell Douglas; Supra.

The plaintiff has shown more than a few isolated incidents of harassment having occurred to establish a violation of Title VII Claims, 42 U.S.C.A. §§ 1981, 1983; Civil Rights Act of 1964, §§ 701 et seq; 718, as amended, 42 U.S.C.A. §§ 2000e et seq; 2000e-17.

CONCLUSION

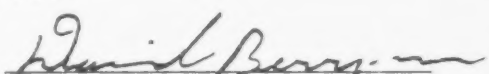
For the foregoing reasons plaintiff submits that the judgement of the United

States District Court for the Central District of California should be reversed, an the award of punitive damages in the amount of $6,530,000.00 and back pay, and restitution of the initiation fees, and to remand to the district court and direct that the defendants grant plaintiff seniority on the defendants roster based upon the date of employment with defendants; that the court reconsiders and award a reasonable attorney fee, and grant any other relief the court finds not consistent with this request.

Respectfully submitted,

DAVID BERRY'AN
606 Levering Ave. #216
Los Angeles, Ca. 90024
(213) 824-1982
Plaintiff
In Propria Personae

Of Counsel
LATHAM & WATKINS
Deanne P. George
Keith M. Parker
701 "B" Street,
Suite 2100
San Diego, Calif. 92101-8197
(714) 752-9100
April 2, 1987



DAVID BERRY'AN
April 2, 1987

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am employed in, or a resident of, the County of Los Angeles, over the age of eighteen. My resident address is:

606 Levering Ave # 216
Los Angeles, Calif. 90024

On July 22, 1987, I served the following document(s):

"PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT"

In the within cause by placing true, correct, and complete copies thereof in each of separate envelopes, which were addressed, respectively, as follows:

LATHAM & WATKINS
Deanne P. George
Keith M. Parker
701 "B" St, Suite 2100
San Diego, Calif. 92101-8197

and then by sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States mail at Los Angeles Executed on July 22, 1987.

David Berry'an

David Berryman
(Signature)

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am employed in, or a resident of, the County of Los Angeles, over the age of eighteen. My resident address is:

606 Levering Ave # 216
Los Angeles, Calif. 90024

On September 6, 1987, I served the following document(s):

"PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT"

In the within cause by placing true, correct, and complete copies thereof in each of separate envelopes, which were addressed, respectively, as follows:

LATHAM & WATKINS
Deanne P. George
Keith M. Parker
701 "B" St, Suite 2100
San Diego, Calif. 92101-8197

and then by sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States mail at Los Angeles Executed on September 6, 1987.

David Berry'an

David Berryman
(Signature)

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am employed in, or a resident of, the County of Los Angeles, over the age of eighteen. My resident address is:

606 Levering Ave # 216
Los Angeles, Calif. 90024

On September 26, 1987, I served the following document(S):

"PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT"

In the within cause by placing true, correct, and complete copies thereof in each of separate envelopes, which were addressed, respectively, as follows:

LATHAM & WATKINS
Deanne P. George
Keith M. Parker
701 "B" St, Suite 2100
San Diego, Calif. 92101-8197

and then by sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States mail at Los Angeles Executed on September 26, 1987.

David Berry'an

(Signature)